

August 6th, 1773

I N F O R M A T I O N

F O R

CALLUM M'GREGOR, alias JOHN GRANT, Pannel:

A G A I N S T

HIS MAJESTY'S ADVOCATE for his Majesty's interest, Pursuer.

THE prisoner was in February last committed to the tolbooth of Edinburgh, in virtue of a justiciary warrant, proceeding on the information of Stuart, son of the deceased John Stuart tenant in Abergairn, accusing him as guilty of the murder of the said John Stuart, who died in the month of December 1747.

He was afterwards sent to Aberdeen to be tried there at the last Spring circuit, having run his letters in order to bring on his trial without delay. But it having occurred to his council, that the prosecution was barred by the lapse of time, this defence was accordingly stated to the circuit court; upon which his Majesty's advocate-depute deserted the dyet, and he was recommitted upon a new warrant, and brought to Edinburgh, that the question of prescription might be more deliberately tried here, as it appeared to be of great and general importance, and not hitherto decided by any judgment of this high Court.

Accordingly the prisoner having been served with a new indictment at the instance of his Majesty's Advocate, and having been brought to the bar upon Monday the 26th of July last, his council took the liberty of stating to the Court, that however conscious the prisoner might be of his innocence, and however certain that he could not be convicted, by any fair proof, of the crime laid to

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his charge, they considered it to be their indispensable duty to state every legal defence against the prosecution ; and particularly the obvious defence of prescription, which arose from the showing of the libell itself, the fact being charged as committed in the evening of the 25th December in the year 1747, no less than twenty five years and two months prior to his commitment, in order to trial. The Court upon this suggestion thought it improper that he should be put to say, whether he was guilty or not guilty ; and having heard council upon the question of law, informations were ordered: In obedience to which, this is humbly offered for the prisoner.

Before entering upon the argument, it may be proper very shortly to notice in point of fact, that during the long interval abovementioned, between the death of John Stuart, and the commencement of this prosecution, the prisoner has had his constant residence in Scotland, and for a great part of that time in the county of Aberdeen, not far distant from the place where the supposed murder was committed. His father being dead, and his mother about to give up family, the prisoner, who dealt in buying and selling sheep, cloth, stockings, and other articles, naturally went in the course of his business to different parts of the country, and had frequent occasion to be at fairs and markets, where he met with persons from the same place where the deceased had lived. A recruiting officer in the neighbourhood, who had laid schemes for making him enlist, obliged him for some time to keep out of the way ; but he soon after took up his residence in Buchan, laying aside his Highland name, which he was obliged to do by law, and which his chief had done before him. And although the indictment says, that he was suspected, and that a warrant had been taken out against him, yet it is not said that this warrant was ever executed, far less that any trial was brought to the effect of fugitation ; which last was indeed unnecessary, as the prisoner never was out of the country, and would cheerfully have stood trial, if any indictment had been served against him.

The only construction therefore to be put on this conduct of the friends of the deceased, and of the public prosecutor at the time, is, that they were satisfied upon further enquiry that he was not the guilty person, and therefore desisted from their intention of prosecuting him. And it is a fact which will come out in the course of the trial, if the preliminary defence shall be overruled, that he has, from that time to this, openly and publicly carried

ried on his business in an honest and industrious way, in the eye of the whole country, and with a character perfectly unexceptionable. He is now in the 59th of his age, and he can bring undoubted proof, that during the whole period already mentioned, he has behaved in a decent and proper manner, and in all respects as an honest and good member of society.

The question then before the Court is, whether he can now, at the distance of 25 years, be brought to trial for the alledged offence : Or in other words, whether the law of Scotland acknowledges a prescription of crimes, and in what time it runs.

The prisoner is advised, in the first place, that the law of Scotland does acknowledge a vicennial prescription of crimes, derived from the civil law, and from the laws of nations. 2dly, That this is founded in reason and expediency, and that it would be highly dangerous to the liberties and security of the subjects of this country, were criminal prosecutions to be admitted at whatever distance of time, without limitation.

Every writer upon the criminal law of Scotland has laid it down as a general proposition, that all crimes are extinguished with us by the prescription of twenty years ; and, with submission, it does not occur to be necessary, that there should be a special statute introducing or establishing this prescription.

Prescription is not merely the creature of statute, though the particular modifications of it, may, and often are the subject of positive institution ; as the same regulations with regard to time and other circumstances, especially in civil matters, will not answer in different countries, whose rights and established customs may happen to be different.

But it is believed, that in scarce any country where a regular system of law is known, is the right of prosecuting actions, whether in civil or criminal matters, understood to be perpetual and without end. At no time was ever this practised as the law of Scotland in civil matters ; and it would be extraordinary to suppose, that criminal prosecutions were held to be on a different and more unlimited footing ; when on the contrary it seems reasonable, that a man's *person* should have a even greater degree of security and protection than his property.

The extinction of actions and obligations by the lapse of time is certainly founded in natural law, as it is noticed by all the writers on the law of nature and nations ; and though it is commonly said, that this part of our law is founded upon statute, the meaning of the

the observation is no other than this, that we have statutes laying down regulations with regard to prescription, both positive and negative in civil matters; but the oldest of these statutes, with regard to the negative prescription of obligations, 1469. cap. 28. is plainly declaratory of the common law, so far as it cuts off action after the party has deserted his right for a long time. This appears from the next act 1474. cap. 54. and Sir George Mackenzie in his observations explains it in that sense: He says, ‘ by this act (*i. e.* the act last mentioned) it is declared, That the act ordaining personal obligations to prescribe in forty years, was to be interpreted so as to extend to all obligations prior to that act, which seems hard; for these who had these obligations were in *bona fide* not to do diligence; and therefore some time should have been allowed to do diligence, as thirteen years were allowed in the act of prescription 1617, and therefore it would seem, that the act 29. parl. 5. Ja. III. ordaining personal obligations to expire in forty years, rather declares what was law before, and that such prescriptions have been formerly allowed here upon the common law or some old act.’

B. 2. tit. 12. Lord Stair begins his title of prescription with saying, ‘ Prescription is the common extinction and abolishing of all rights, and therefore is reserved here to the last place; the name and nature whereof we have from the civil law, wherein prescription is sometimes largely taken for any exception, but hath been appropriated to the most common exception in all cases, whereby all actions and causes are excluded by course of time; and so prescription had no further effect, than to maintain the possessor in possession by exception, but not to recover possession being lost, and could not constitute the right of property.’ A great part of the title is taken up with explaining the civil law as to prescription, and he says, that prescription being founded on public utility has been received by most nations, though not the same, ‘ but different in diverse nations as to the matter, manner, and time of it.’ This is evidently the case: The foundation of it is the same every where, though particular constitutions may be necessary as to time and manner, &c. adapted to the usages and circumstances of different nations.

In the same way, Lord Bankton, vol. 2. p. 165. says, ‘ That the statute is declaratory of the civil law, whereby obligations were cut off by the prescription of forty years, and most of them indeed by the course of thirty; for otherwise the statute could not regularly have been extended to prior bonds, whether a suit had been commenced upon them or not, or rather it is declaratory of the canon law, whereby the prescription of forty years was uniform

form as above. And indeed, the civil and canon laws were generally conjoined when our legislature was forming a statute after their exemplar.'

We find the doctrine of prescription laid down and taught upon general principles in the most antient of our law books. Lord Stair treats of it in this way ; Balfour and Spottiswood have each of them a title upon the subject : And therefore the council for the prosecutor must have been mistaken, when they observed, that the word *prescription* was not to be found in any of our antient law books ; it is believed there are also common law prescriptions in England.

In the Roman law, the matter of prescription in civil rights was attended with various distinctions which could not well be received here. Thus the *Usucapio*, or positive prescription, made a difference between *res mobiles* and *immobiles*, between things situated in Italy and elsewhere, and between acquiring *inter absentes* and *inter praesentes*. The negative was likewise of various kinds : Certain rights and actions were called *temporary*, because they expired in a short time ; others *perpetual*, because they lasted 30 or 40 years, L. 3. *Cod. de praescrip. 30 vel 40 ann.* We did not think it proper to adopt all these distinctions ; and on this account, perhaps, our statutes were made, as to prescription in civil rights, founded on the general principles of the Roman law, but varying the mode of it.

With regard to criminal matters, one uniform and clear rule was laid down in the Roman law, that all crimes were extinguished in twenty years, after which no criminal prosecution of any kind could be insisted in, this being the *longissimi temporis praescriptio* as to crimes ; though in some few cases a shorter prescription was introduced. In L. 1. 12. *Cod. ad legem Corneliam de falsis*, it is said, ' Querela falsi temporalibus praescriptionibus non excluditur, nisi viginti annorum exceptione ; sicut caetera quoque fere crimina.' And in various other texts, the prescription of crimes is taken for granted as a thing established and beyond doubt ; particularly in L. 4. *Cod. de apostatis*, L. 13. *de diversis temp. praescriptionibus*, L. 1. § 4. *ff. de jure fisci*, L. 3. *ff. de requirendis vel absentibus damnandis*, L. 11. *ff. ad senatus-consultum Turpilianum*.

It was said, that the above texts, particularly the L. 12. *Cod. ad legem Corneliam de falsis*, were not sufficiently explicite ; for that the word *fere* seemed to imply that some crimes were not abolished by the twenty years prescription. Upon attending however to the words

of the law, your Lordships will see clearly, that the word *fere* alludes to the case of certain crimes which were extinguished sooner than by the twenty years prescription. These were adultery, peculation, and some others; and so the matter is very fully explained by *Mattheus, tit. de praescriptione temporis*, in these words:

‘ Extinguuntur etiam crimina praescriptione temporis; nam, quemadmodum in civilibus causis praescriptio temporis necessaria visa est, ut esset litium aliquis finis, nec semper incerti cives de dominio rerum suarum; ita eadem necessaria visa est in causis criminalibus, ut accusationum aliquis finis esset, nec semper incerta spe atque expectatione penderent, quicunque criminis aliquis insimulantur. I. Est autem longissimi temporis praescriptio in causis criminalibus XX annorum; qua perimuntur omnia crimina, quae nominatim brevioris temporis spatio coarctata non sunt. Breviori tempore perimitur adulterium et stuprum; nempe vel quinquennio continuo, vel utili semestri; l. 5. 28. C. ad leg. Jul. de adult. 29. § *semestrium*, et § *seq.* D. eod. l. 1. § *accusationem*, D. ad S. C. Turpil. *peculatus quinquennio*, l. 7. D. ad leg. Jul. *pecul.* Accusatio quae descendit ex S. C. Silaniano simpliciter, l. in *cognitione*, 13 D. de S. C. Silan. Quae autem supra scriptum XX annorum spatium excedant, crimina nulla sunt. Non parricidium; nam quod dicitur in l. ult. D. ad leg. Pomp. de par. semper parricidii accusationem permitti, id explicandum ex D. l. 13. de S. C. Silan. ita: Quanquam accusatio aperti contra S. C. testamenti perimitur quinquennio, eorum tamen qui parricidii poena teneri possunt semper accusatio permittitur. *Semper*, id est vicennium usque, quod in criminibus longissimum tempus esse noscitur.” His explanation of the word *semper*, is supported by the analogy of civil actions, which were called *perpetual* when they lasted 30 years. He goes on to show, that the *accusatio suppositi partus*, was likewise extinguished by the lapse of twenty years, notwithstanding some texts which seemed to infer the contrary, and he condemns the opinion of those who maintain, that the *crimina graviora* did not prescribe. He adds, ‘ Illud quoque controversi a nonnullis video, solumne accusatorem, an et judicem, excludat haec praescriptio? Sed controversunt profecto id sine justa causa. Quae enim ratio diversitatis reddi potest, ob quam excludendus sit accusator, non sit excludendus iudex, qui officii ratione in reum vult inquirere? Qua lege id confirmatur? Nulla profecto: At cum S. C. docent, omnem quaestionem fidelem, si non alia si prae-

‘ praescriptio, XX annorum silentio perimi. Est autem in criminalibus, quæ longissima XX annorum præscriptio: Hinc videmus, Ciceronem IV. Verr. inter alia crimina Verri, hoc quoque exprobare, quod post XX. annum de hæreditate Veneri commissa cognovisset, cum temporis præscriptione jam tuti heredes essent. Præscriptionem enim disertis verbis agnoscit eo loco Asconius.” He further says, ‘ Est autem hoc loco non prætereundum, nihil interesse, utrum quæsitō criminum sciverit, an ignoraverit, crimen admissum esse; nam, si in præscriptione X vel XX annorum, qua res immobiles acquiruntur, nulla scientia vel ignorantia exspectanda est, ut dicitur *L. ult. circa fin. C. de præscr. long. temp.* quanto minus in hac vicenaria præscriptione scientia quæsitōris desideranda est, cum ea in criminibus longissimi temporis sit; in longissimi autem temporis præscriptionibus certum est scientiam adversarii minime desiderari.’

Voet lays down the same doctrine in *tit. de diversis tem. præscr. §. 6.* where he says, ‘ Vicennium in accusationibus criminum et criminalibus fisci quæstionibus, in quibus minora tempora servari, specialiter constitutum non est.’ And in the next section, he lays it down to be the *usus hodiernus*, and he says the same thing in *lib. 48. tit. 16. §. 5*

Peregrinus, *ad Codicem lib. 9. et 2. §. 18.* says, ‘ Effectus propositæ accusationis est, quod non currat aliqua præscriptio. Dico *propositæ*, nam proponendæ uti et plerisque criminibus post annos 20 præscribitur, quod accipe de criminibus transeuntibus et momentaneis, quæ semel perpetrantur; namquæ sunt successiva et permanentia, uti matrimonium contra canones initum, hæresis, apostasia, et similia, in quibus quis persistit, cum ponat continuatum delictum, non potest esse locus præscriptioni, quæ demum inchoatur a tempore cessantis delicti. Dixi *plerisque*, non quod sint crimina, quorum accusatio perpetuo duret, sed quod sint quibus minori spatio præscribitur, de quibus suis locis dicetur. Præterea, quod lapsu temporis tollatur, aboleaturque delictum, non inde sequitur, quod tempus faciat desinere esse delictum, cum illud oneret animam delinquentis, quo diutius eam detinet delicto obligatam: Sed quod qui tanto tempore a crimine abstinit, videatur potius impulsu, et naturæ infirmitate, ignorantia, quæ delictum minuunt, peccasse, quam dolo et peccandi consuetudine. Ex sequentibus enim, in iis præsertim quæ ad mores attinent, præcedentia mirum in modum declarantur; atque hæc est ratio cur uti actioni civili, ita et criminis accusationi

‘ præscribatur.

‘praescribatur, tollaturque decursu temporis, quia odiosa.’ And he quotes several other authorities in support of his opinion.

Cujacius, *Vol. 4. Col. 1338.* says, ‘Regulariter crimina finirentur vicennio continuo, ut crimen *homicidii*, crimen falsi, et alia innumera, quae nisi instituantur intra viginti annos, reus erit securus.’ The same author, in *Observat. lib. 4. cap. 14.* says, ‘Crimina fere omnia 20 annorum praescriptione tolli Imperatores aiunt, in *L. querela, C. ad. leg. Corn. de fals. et Constantinus probat his verbis, Lib. 1. Epit.* “ΟΤΙ ΤΑ ΕΥΧΛΗΜΑΤΙΚΑ ΕΙΚΟΣΑΙΤΙΑ ΟΒΑΝΝΙΟΤΑΙ. Idcirco aiunt fere quoniam quaedam sunt crimina quae quinquennii praescriptione tolluntur, ut puta quae descendunt ex lege Julia de adultariis.’ He then goes on to refute the opinion of those who think, that *parricide* and the *crimen suppositi partus* last beyond twenty years, and he adds, ‘Licet quaedam sint crimina quae minori tempore finiantur, nulla tamen, quamvis gravia et Reip. perniciofa, ultra vicennium porrigi certa auctoritate confirmari potest.’

The same doctrine is taught in very clear and express terms by Julius Clarus, *Sententiarum lib. 5. §. fin. quæst. 51.*—Farinacius, *lib. 1. tit. 1. quæst. 1. No. 68.*—Caballus, *Casus 5tus, p. 6.*—Heineceius, *Pand. lib. 44. tit. 3. §. 370.*—And a great many other authorities are quoted by them.

Carpzovius has been referred to on the other side, as giving a contrary opinion, *Parf. 3. quæst. 141.* But this is a mistake: He does not properly give a different opinion; for in §. 6. *et sequent.* he lays down the same general doctrine with regard to the vicennial prescription of crimes, both in the civil law, and in *foro Saxanico*, which he says, without any statute, must be understood to follow the common law, (*i. e.* the civil law) in this particular; but in §. 52. he adds, ‘*Tertio Limit.* In criminibus exceptis et enormibus, veluti haereseos, apostasias, paricidii, *assassinii*, falsae monetae, et partus suppositi, quae crimina enormia vicenniali praescriptione neutiquam tolluntur, sed in perpetuum durant.’ Some of these exceptions have a foundation in the civil law, though they are disputed by Cujacius and other authors as above; but it is plain, that Carpzovius goes too far, when he brings in *assassinium*, and other *crimina enormia* in general, as falling under the exception; for he gives no authority from the civil law as to these, and he is condemned by all the other writers, as indeed his general exception of *crimina enormia* is without the least foundation in any part of the civil law.

At any rate the *crimen assassinii* here mentioned by him, was a different crime from that of common murder. It was a species of it highly aggravated, and more severely punishable, being committed by those who made a trade of murdering people for hire, and were known by the name of assassins. Carpzovius has a separate title upon this *crimen assassinii*, *par. 1. quæst. 19.* He classes it next to parricide; and being of opinion, that the *crimen parricidii* did not prescribe, he thought the same ought to obtain with respect to *assassinium*, 'in quo poena homicidii æque aggravatur, quando nempe quis occidit alium ad instantiam alterius, corruptus pretio vel pecunia, quo casu dicitur committi crimen assassinii.' He adds, in § 7. 'Et quamvis assassinium species homicidii dicatur, longe tamen gravius est simplici homicidio, idque propter pecuniam intervenientem, quæ regulariter facit delictum atrocius, et poenam auget.'

It will therefore appear to your Lordships, that there is in reality no difference among the writers on the civil law with regard to this matter. All of them admit the vicennial prescription of crimes; and none of them pretend to say, that the crime of simple murder, does not fall clearly within the rule. These lawyers do also uniformly agree, that such is the established law and practice of the particular countries where they wrote; so that there can be no doubt of its being the law of France, Germany, and other countries.

Indeed, the law of France appears to be quite explicit on this head, not only by the authorities of these lawyers, but by judgments of their courts; particularly of the parliament of Paris, deciding the very question now before your Lordships. Thus, in a case decided 6th July 1703, in Vol. V. of the *Journal des Audiences*, it was found by the parliament of Paris, that the vicennial prescription took place, and was not interrupted by a sentence *par contumace*, unless the same had been executed by hanging the party in effigy. The reasons given are, '1mo, Parce que celui qui pendant un si long interval, a porté son crime et l'inquietude d'être poursuivi, est réputé assez puni. 2do, Parce que pendant ce tems les preuves qu'il pouvoit avoir de son innocence, peuvent avoir deperi; qu'au contraire un accusateur pourroit se servir de ce tems pour pratiquer des preuves, et on presume toujours pour l'innocence; on regarde comme favorable tout ce qui va à la décharge.' Two other cases of the same kind are to be found in the same

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volume of the *Journal des Audiences*, 9th July 1706, and 26th August 1707.

Plaidoye 28.
p. 507.

Another case will be observed in the celebrated pleadings of Monsieur le Maitre, who begins his address to the court by saying, that his client, the Sieur de Neuilly, with shame confessed that he had been guilty of the crime of murdering his brother; but ‘Ce qu’il vous demande aujourd’huy, Messieurs, est que vous ayez pitie de son infortune, et que vous suiviez a l’egard de luy la loy publique et generale de la prescription de vingt ans, que vous gardiez inviolablement dans les crimes les plus odieux, dans les assassinats les plus qualifiez et les plus horribles, dans les parricides les plus execrables. Il s’appuye sur la loi Romaine, qui a etabli cette maxime en termes formels. Il s’appuye sur vos arrests, qui l’ont approuvée et confirmée. Il s’appuye sur les raisons fondamentales de cette celebre juris-prudence. Et c’est ce que j’ai a vous représenter maintenant, puisque les defendeurs ont enterpris d’en contester la justice, et d’en combattre l’autorite.’

Another case equally remarkable occurs in Monsiuer Denisart’s collection, *voce, Crime*, where it was found, that though the twentieth year was only begun, the prescription took place, and the pannel, though accused of murder, was acquitted. From these cases too, and the arguments used in them, it appears, that the law of France in this particular is founded upon no special constitution, but upon the Roman Law, and upon the principles of common law and reason.

Inst. B. 1.
tit. 1. §. 7

With us, there can be no doubt that the Roman Law is much regarded, and is considered as one of the fountains of our jurisprudence, and in reality a part of it in many branches of the law where our own statutes and customs are silent. Sir George M^r Kenzie says, ‘That the civil law has great influence in Scotland, except where our own expreis laws or customs have receded from it.

Inst. B. 1.
tit. 1. §. 41.

And by the *common law* in our acts of Parliament, is meant the civil law of the Romans.’ And Mr Erskine observes, ‘That the powers exercised both by our sovereigns and judges, have been justified by parliament on this single ground, that they were conformable to the Roman Law. Thus the revocations by our Kings of deeds granted during their nonage, are expressly founded on the right competent to minors by the Roman law, 1493. c. 51. 1540. c. 70; 1587. c. 31. ver. 9. Thus also, the trying of treason, after the death of the traitor, was approved

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‘ by parliament, on account of its conformity to the common law,
 ‘ though there was no special provision of the realm made there-
 ‘ upon, 1540. c. 69. 2dly, A special statute was judged necessary
 ‘ soon after the reformation, for abrogating such of the laws, either
 ‘ civil or canon, as were repugnant to the protestant doctrine,
 ‘ 1567. c. 31; and the abrogation of a law is generally understood
 ‘ to import, that the law abrogated had formerly been in force.
 ‘ These observations prove at least, that great weight is to be laid
 ‘ on the Roman Law in all cases not fixed by statute or custom,
 ‘ and in which the genius of our law will suffer us to apply it.’
 And Lord Stair, though he does not admit that the civil law is ^{B. 1. tit. 8.}
 binding for its authority here, yet says, it is followed *as a rule* for ^{§ 12.}
 its equity.

As to criminal matters, Sir George M^c Kenzie lays it down very
 clearly, that the civil law is followed with us as our common law,
 where we have no express statute or custom. In questions con-
 cerning civil rights, we have a mixture of the feudal and canon
 laws along with the civil law; but in criminal questions, the great
 rule of determination seems to be the civil law, where our own
 statutes and customs are deficient. He says, ‘ We follow the ^{Criminals}
 ‘ civil law in judging crimes, as is clear by several acts of parlia- ^{tit. 1. § 3.}
 ‘ ment, wherein the civil is called the common law. And Robert
 ‘ Leslie’s heirs are, by the 69. act, Parl. 6. James V. ordained to
 ‘ be forfeited for the crime of treason committed by the father,
 ‘ according to the civil law. And forfeiture in absence was al-
 ‘ lowed by the Lords of Session, in anno 1669, because that was con-
 ‘ form to the civil law; and falsehood is ordained to be punished
 ‘ according to the civil and canon law, act 22. parl. 5. Queen Mary.
 ‘ And that the civil law is our rule where our own statutes and
 ‘ customs are silent or deficient, is clear from our own lawyers,
 ‘ as *Skene Annot. ad lib. 1. R. M. cap. 7. vers. 2.* And from *Craig,*
 ‘ *lib. 1. deig. 2.* as also from our own historians, *Leshy, lib. 1. cap.*
 ‘ *leg. Scotor. Boet. lib. 5. hist. Camer. de Scot. Doctr. lib. 2. cap. 4.*
 ‘ And the same is recorded of us by the historians and lawyers of
 ‘ other nations, as *Forcat. lib. 1. Hist. Angl. Petr. Diamitis Geograph.*
 ‘ *Europ. Tit. d’ Escosse,* and *Duck de auth. jur. civ. lib. 2. cap. 10.* And
 ‘ though the Romans had some customs or forms peculiar to the
 ‘ genius of their own nation, yet their laws in criminal cases are of
 ‘ universal use; for crimes are the same almost every where, as
 ‘ Boet. well observes, *Leges Romanas a Justiniano collectas tanta ratione*
 ‘ *et sermonis venustate esse, ut nulla sit ratio tam fera, vel ab humanitate*
 ‘ *abhorrens,*

‘ *abhorens, quæ eas non fuerit admirata.* And King James V. was so fond of the civil law, as Boet. observes, *lib.* 17. that he made an act, ordaining, that no man should succeed to a great estate in Scotland, who did not understand the civil law; and erected two professions of it, one at St. Andrews, and another at Aberdeen. And when King James I. did, by 48. act of his third parliament, ordain, that his subjects should be governed by no foreign laws, he designed not to debar the respect due to the Roman Laws, but to obviate the vain pretences of the Pope, whose canons and councils were obtruded upon the people as laws by the churchmen of these times.’

The article of prescription of crimes is one of those which we have taken from the civil law, following the examples of other nations which have done the same. Sir George M^r Kenzie has an express title upon the subject, where he declares his opinion very clearly: He indeed says, that it has been doubted by some, and he states the arguments on that side of the question; but he answers these arguments very fully as follows: ‘ It may be answered to the first, that our criminal law being much more founded upon the civil law than any other part of our law is, there needed no particular statute in this case with us, especially seeing this prescription of twenty years in crimes, has in effect become the law of nations; and several other nations who have many statutes in other cases, have yet allowed of this prescription without any particular statute. There seems to be greater reason, that an act should have been necessary for prescription in *civilibus* than in crimes, because in civil cases, the Roman Law was very various, and *quoad* the particular period of time was altered by all nations, according to the particular state of their affairs; but in criminals, their prescription was exactly observed by all nations, and was very reasonable, and there being expressly *jus quaesitum in civilibus* to every private person, it was necessary that should have been taken away by an express statute; but it is not so in crimes, where in effect, at first there was no express *jus quaesitum* either to the King or any private party, but only a *potes tas acquirendi*, for the *jus quaesitum* is only by the sentence; for before sentence the fisk could not dispo ne upon, and so had no right to the malefactor’s goods; and this answers likewise the second reason. To the 2d, 3d, 4th, and 5th, it is answered, that doubtless the wise Romans, and other nations, could not but have these inconveniencies under consideration when they introduced the foresaid prescription in crimes.

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‘ And to the third, it is particularly answered, that if private parties
 ‘ will not pursue their revenge, they justly lose the capacity by
 ‘ their negligence. And his Majesty having so many sworn officers
 ‘ in every corner of the land, it is not presumable that any incon-
 ‘ veniency will arise through want of information ; but if there do,
 ‘ it is much more reasonable, that these negligent judges should be
 ‘ punished, especially seeing there are express laws appointing
 ‘ negligent officers in such cases to be punished. To the 4th, it
 ‘ is answered, that negative arguments brought from the not being
 ‘ of a law or a custom, are not concluding ; for as in many other
 ‘ cases, so this might have been argued as strongly as here against
 ‘ his Majesty’s Advocate, when he of old craved that the heirs of
 ‘ traitors might be forfeited for their predecessor’s guilt, and when
 ‘ he of late craved that probation might be led against traitors in
 ‘ absence ; in either of which cases, there was neither act nor prac-
 ‘ tice, nor could any thing have been alledged, but the authority of the
 ‘ civil law, and the consent of other nations. To the 5th, the
 ‘ crime being taking away by so long a time, it were unjust to take
 ‘ away a man’s life upon the former prescriptions, and the fear of
 ‘ punishment is a sufficient punishment for all the malice arising
 ‘ from that prescription : Neither, is it presumed, but that if a
 ‘ malefactor continue to be ill, he will be pursued within twenty
 ‘ years ; and if he did, for twenty years, live so soberly and dis-
 ‘ creetly, as that the law thought not fit to take notice of his former
 ‘ crime, there is little hazard of any future malice.’

Mr Forbes, in his title concerning the extinction of crimes, says, *Inst. vol. 2.*
 ‘ Prescription in matters criminal is no less, if not more necessary *P. 21.*
 ‘ than in civil cases, that people may not lye under a perpetual un-
 ‘ certainty as to their lives and possessions. All crimes with us
 ‘ (as by the civil law) prescribe in twenty years, except such as are
 ‘ declared to be extinct in a shorter time.

Mr Erskine in his late book teaches the same doctrine ; ‘ Crimes *B. 4. tit. 4.*
 ‘ are also extinguished by prescription, which operates by the bare *§ 109.*
 ‘ running of time, without any act, either of the sovereign par-
 ‘ doning, or of the private sufferer forgiving.’ He says, that this
 is censured by some writers, for the reasons mentioned by him ;
 but he adds, ‘ Nevertheless the prescription of crimes seems to be
 ‘ established upon a solid foundation ; for not only is the deter-
 ‘ ring of others from following wicked courses, which is one of
 ‘ the ends of punishment, in a great degree lost, when the penalty
 ‘ of

‘ of the crime is inflicted so long after its commission, that there
 ‘ hardly remains the least memory of it; but, 2^{dly}, by delaying the
 ‘ trial for many years together, the pannel may be quite deprived
 ‘ of the benefit of exculpation, by the intermediate death of wit-
 ‘ nesses who might have proved his innocence. Upon these
 ‘ grounds, crimes prescribe, both by the Roman law, and by the
 ‘ usage of Scotland, in twenty years.’

He further takes notice, that ‘ in particular crimes, this vicen-
 ‘ nial prescription is reduced and limited by our statutes to
 ‘ a shorter period. No person can be prosecuted upon the act for
 ‘ wrongous imprisonment after three years, 1701. c. 6. nor upon
 ‘ the riot act after one year, 1^{mo} Geo. I. c. 5. § 8. That parti-
 ‘ cular species of treason, that is inferred from making instruments
 ‘ of coinage, is limited to six months, by 7^{mo} Ann. c. 25. § 3.’
 And several other instances of the same kind are mentioned. All
 actions too upon penal statutes undergo a short prescription, by
 the statute 31. of Eliz. now extended to Scotland by the Union.

It is a remarkable circumstance, that wherever an express statu-
 tary limitation has been introduced as to particular crimes, or penal
 actions, it has always been for a period less than twenty years, as
 appears from the above and other examples; nor will an instance to
 the contrary be found. This shows, that the vicennial prescrip-
 tion has all along been understood among us to be the *longissimi tem-
 poris præscriptio* in criminal matters.

§ 110

It is likewise very properly observed by Mr Erskine, ‘ That
 ‘ certain crimes are, without the aid of any statute, extinguished
 ‘ by a shorter prescription than twenty years. By our old law of
 ‘ the Majesty, l. 4. c. 10. the party hurt or suffering by the
 ‘ crimes of rape, robbery, or haime-sucken, was not heard after a
 ‘ silence of twenty-four hours, from a presumption that no person
 ‘ could be so grievously injured, without immediately complaining;
 ‘ and it is probable, that a prosecution upon those crimes, if de-
 ‘ layed for any considerable time, would be cast even at this day,
 ‘ or at least the punishment restricted. It would seem, that petty
 ‘ riots, and other slighter delinquencies, ought also to suffer a short
 ‘ prescription, without either any express forgiveness from the na-
 ‘ ture of the offence, and the silence of the party.’ This is a fur-
 ther proof, that we have prescriptions at common law without the
 aid of statute.

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In short, we have the concurring opinions of all the writers upon the criminal law of Scotland agreeing in this, that the prosecution of crimes ought not to be perpetual, and that the vicennial prescription of the civil law is the rule with us.

Neither does it appear, that there is any practice or precedent, which in the least degree contradicts this rule. Some instances were mentioned on the other side; but when inquired into, they will be found to be of no consequence. The case of Isobel Young in 1629 was a case of witchcraft and sorcery, which appears to have been considered as of the same kind with apostacy or hæresy in the civil law, being a *crimen continuum*, not consisting in a single act, or in separate and independent acts, but in a constant and habitual train of guilt, continued downwards to the very time of the trial. In such cases, it has been held by some of the civilians, that prescription cannot operate. And accordingly, we do not see in the case of Isobel Young that any such defence was pleaded for her, as indeed it was in vain; because if she was a witch, she was just as much so the day before she was tried, as at the distance of twenty or forty years preceeding. The libel charges her with having been twenty-eight years a notorious witch and consultor with the Devil, whose mark she had received under her left pap, and that she renounced the baptism. This poor woman fell a sacrifice to the ignorance and prejudice of the times, for the crime of *being a witch*, not for the crime of having committed witchcraft twenty-eight years before.

Julius Clarus puts the case of a *delictum reiterabile*, and asks the question, Whether the prescription is to run *a die primi delicti commissi, an autem ab ultimo delicto*. His answer is, *Quod est computandum a die ultimi delicti*. The same author says, that acts which are prescribed may still be brought in to aggravate other acts which are not prescribed. “Unum tamen scias in hoc proposito, quod ex maleficiis de quibus obstante cursu temporis non potest cognosci, potest index alia maleficia, de quibus cognoscere potest aggravare, et in majori pœna punire.” And he quotes various authorities in support of this opinion; and therefore, though instances should be found of pannels being charged with a continuation of criminal acts, some of them going backwards beyond twenty years, this would in no shape influence the present question, where

Quaest. 52.

§ 3.

§ 7.

where a prosecution is brought upon one single criminal act, at the distance of twenty-five years from the alledged commission of it.

The next case of Alexander Drummond, in 1629, was precisely of the same nature, being a trial of forcery. The pannel was condemned upon his own confession, and appears to have had no council.

John Brugh, in 1644, was in the same circumstances. The verdict bears, " That the jury was ripely and at length advised with " the hail depositions and *confessions* produced for verification of the " dittay."

The same is to be said of Agnes Finny in 1644. The special acts libelled against her came down till within nine weeks of the indictment, and she was in general accused of being habite and repute a witch.

James Wilson, in 1649, appears to have been accused of different crimes of incest and adultery. His trial was during the Usurpation; and the charge is so short and indistinct, that neither the *time* nor place of the adultery are mentioned; and his own confession appears to have been the only evidence against him. He had no council, nor does it appear, whether there was room for the plea of prescription or not. No defence of any kind is stated for him.

Major Wier and his sister, in 1670, were indicted, not for one crime, but for a habitual train, of incest, adultery, forcery, &c. for a long course of years. Among other articles, the Major is charged with ' the pretensions of extraordinary sanctity.' The sister confessed, and Major Wier said, he *thought himself guilty*; upon which they were both condemned. No defence was offered for them, and as the crimes with which they were charged were said to have been continued down to within a short time of the trial, there was not properly any room for the defence of prescription.

In the case of William Bruce, April 1670, a variety of reiterated crimes were charged down to the 1668, within two years of the trial, and no defence of prescription appears to have been made; so that this case does not differ from those which have been mentioned. In the note of this case given in upon the part of his Majesty's Advocate, it is said, that the crimes charged against him came only down to 1661, within nine years of the trial: But this is a mistake; for the record shows, that they were continued down to 1668.

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The last case, viz. that of Isobel Elliot and others in 1678, was another case of witchcraft; and as the libel bears, that she only entered to the Devil's service in the 1650 or 1651, so the vicennial prescription was not run at the time of the trial, even if the crime had been considered as of that nature in which prescription could take place.

These are the whole instances mentioned on the part of the prosecutor; and it is submitted, how insufficient they are to establish the proposition maintained by him. Not one instance has been pointed out, of an individual crime consisting of a single act, such as murder, being tried at the distance of twenty years from the time of its commission, and the trial sustained; far less does any case appear, in which the plea of prescription was stated and over-ruled.

Neither ought it to have been any effect upon the argument, that the prisoner's council have not on the other hand been informed of any cases, in which a judgment of the Court was given, sustaining the defence of prescription. It is not an easy matter to investigate into all the justiciary records, nor has there been time or opportunity so to do; and besides, it is a material circumstance in favour of the prisoner's argument, that so few trials have been brought at the distance of twenty years. The plain inference to be drawn from this is, that the public prosecutor has been sensible that it was unnecessary and improper to attempt any such prosecution, as the law stood against it. And indeed there is one instance which seems to show in what light this was understood. It is the case of M^r Leod of Assint, who was tried in February 1674, upon an indictment containing, 1st, The betraying the Marquis of Montrose in August 1649, for 400 bolls of meal. 2^{dly}, Opposing Lord Seaforth in 1654: And, 3^{dly}, several other treasonable acts of a later date. Before any debate on the relevancy, his Majesty's Advocate declared, 'He did not insist upon the two first crimes libelled, but only as aggravations.' The first of them was twenty-five years old, the other about twenty; and it would seem his Majesty's Advocate did not chuse to insist in them, though more important than the others; because being separate and independent crimes, and beyond the twenty years, the defence of prescription might have taken place against them. The record says 'that he was made clean by the assize.'

As to the authority of Lord Fountainhall in his decisions, it is plain, that his Lordship was not there writing *ex proposito* upon

the subject, nor did the case before him lead to any accurate examination of it. He only makes a very overly and short observation, that we have not what he calls the vicennial presumption, meaning perhaps that we have no statute to that purpose, and the case mentioned by him, was that of a murder committed only eighteen years before, so that there was no room for it; but he adds, 'that the length of time since it was perpetrated may serve to expiate and obliterate the crime in some measure.' And accordingly he says, the remission was obtained, though violently opposed by the deceased's friends. Any loose inaccurate expression of this kind thrown out by Fountainhall, can never outweigh the concurring authorities of all our lawyers who write *ex professo* upon the subject, and the strong evidence arising from the above case of Assint.

Vol. 4. p.
130. 311.

The law of England was resorted to by the prosecutor, as not acknowledging the vicennial prescription of crimes. The prisoner's council does not pretend to any knowledge of that law; but he observes, that one of the modes of trying murder and some other crimes is, by what is called an appeal of felony at the instance of the private party; and from Mr Blackstone it appears, that this mode of prosecution is subject to a very short prescription; 'By the statute of Gloucester 6. Edw. I. cap. 9. all appeals of death must be sued within a year and a day after the completion of the villainy by the death of the party; which seems to be only declaratory of the Old common law; for in the Gothic constitutions, we find the same; *Prescriptio annalis, que currit adversus actorem, si de homicida ei non constat intra annum a cæde facta, nec quinquam interea arguat et accuset.*'

The only other form of trying such crimes is, by presentment or indictment, upon the previous finding of a grand jury upon oath; and for the most part in the case of murder, there is another previous finding by the Coroner's Inquest, immediately after the commission of the fact. These are so many guards against vexatious or unfair prosecution, that it was not perhaps thought necessary in England to have any express limitation of criminal suits, instituted in that manner; tho' at the same time Wood, in his *Institutes*, b. 4. chap. 4. says, "It is to be wished, that in criminal cases at the suit of the King there was a limitation of time for prosecution, especially in cases of life and death."

In Scotland, the case is somewhat different. The right of prosecution is entirely committed to an officer of the Crown; and whatever respect may be due to the well known merit of the person who presently enjoys that high trust, yet it may be said with-
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out offence, that an unlimited power of prosecution in any officer of the Crown is not the most favourable plan of criminal procedure, to the liberties and safety of the subjects of this country. If the English lawyers wish for a limitation of criminal suits at the instance of the King, though their forms of trial are more adapted to the constitution of a free government than ours, we certainly ought not to be desirous of giving up that prescription, which all our lawyers have taught us to consider as an established part of our law in criminal matters.

The great end and object of punishment in a civilized state, is, to preserve the peace and order of the community, and to prevent as far as possible the commission of future offences of the same kind. In the more early and rude periods of society, the governing principle is, that of private revenge, and the party injured is the avenger of his own wrong. To this we may ascribe those deadly feuds which generally take place in the infancy of government, and from the same origin the custom arose among the Longobards, and other nations, of extinguishing crimes by pecuniary composition.

By degrees the right of revenge has in all modern nations, where any regular system of law is known, been surrendered by individuals, and vested in the public magistrate; upon this ground, that the commission of crimes is a violation of the public peace, and an injury done to the whole community. The right of punishment is then transferred to disinterested judges, and even the power of prosecution is regulated and kept within bounds by the public law.

The object therefore of criminal prosecution being no longer the gratification of private resentment, but the prevention of future crimes, this is sufficiently accomplished, by proceeding in such a manner as to induce the delinquent himself, and the rest of mankind, not to be guilty of such offences in time coming, or perhaps to put it out of the power of the delinquent to be guilty of them, if he appears to be incorrigible.

The civil law says, that the end of punishment is, ‘*Ut vel meliores reddantur homines, vel horum exemplo alii in officio continentantur.*’ This is very properly expressed by Mr Blackstone. Vol 4.
 ‘As to the end or final cause of human punishments. This is not P. 11.
 ‘by way of atonement or expiation for the crime committed;
 ‘for that must be left to the just determination of the Supreme Being; but as a precaution against future offences of the same kind.
 ‘This is effected three ways: Either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment, are inflicted: Or by deter-
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ring others by the dread of his example from offending in the like way, *ut pœna* (as Tully expresses it) *ad paucos, metus ad omnes perveniat*; which gives rise to all ignominious punishments, and to such executions of justice as are open and public: Or lastly, by depriving the party injuring of the power to do future mischief; which is effected, by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. The same one end of preventing future crimes is endeavoured to be answered by each of these three species of punishments. The public gains equal security, whether the offender himself be amended by wholesome correction; or whether he be disabled from doing any farther harm; and if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other citizens. The method however of inflicting punishment however ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it; therefore the pains of death, and perpetual disability by exile, slavery, or imprisonment, ought never to be inflicted, but when the offender appears incorrigible.

- p. 6. The same sentiment is expressed by a late author on penal law, who says, 'The prevention of crimes should be the great object of the lawgiver; whose duty it is to have a severe eye upon the offence, but a merciful inclination towards the offender. It is from an abuse of language that we apply the word *punishment* to human institutions. Vengeance belongeth not to man. Criminals, said Plato, are punished; not because they have offended; for what is done can never be undone; but that, for the future, the criminals themselves, and such as see their punishment, may take warning, and learn to shun the allurements of vice. It is the end then of penal laws, to deter, not to punish.'

Tit. of Punishment.

The same account of it is given by our own lawyer Sir George M'Kenzie; who says, 'Punishments are inflicted, not only to satisfy either the public revenge of the law, or the private revenge of the party, but rather to deter others for the future.' And indeed, this is the conclusion of every criminal indictment: 'You ought to be punished with the pains of law, to deter others from committing the like crimes in time coming.'

But this great object of criminal jurisdiction will by no means be answered, by bringing trials at a great distance of time, after the commission of the offence has been lost in oblivion, and after the supposed criminal has lived for many years a decent, inoffensive, and virtuous life, and has become a good and worthy member of society,

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ty, if ever he was otherwise. The bringing a man in those circumstances to trial and punishment, has no good effect. It excites regret in the minds of the beholders, and is apt to raise disgust and aversion to the execution of justice.

It has been said, that nothing contributes more to the discouragement of heinous crimes, such as murder, than an impression upon the minds of the people, that no length of time will expiate the offence, or prevent the guilty person from being brought to justice; and that even the divine law ordains, 'That whosoever sheddeth man's blood, by man shall his blood be shed.'

As to the divine precept, it means no more than that the punishment of murder is capital, a proposition which never was denied; but it says nothing one way or other with regard to the limitation of criminal prosecutions: And though the dread of punishment is, no doubt, one great cause of preventing crimes, the question is, Whether it is not sufficient for the purpose, that the operation of this dread not only takes place before the commission of the crime, but must continue for the long period of twenty years after; and whether there are not other reasons of expediency which come in to overbalance the consideration just now mentioned, and greatly to preponderate in favour of the prescription after twenty years.

Punishment is not a *good*, but an *evil*, consequent upon crimes; and our lawyers say, '*Quam cunctanter ad graviora supplicia, ac non nisi urgente necessitate, deveniendum est.*' If a man has been guilty of a rash action in his youth, of which he has long repented, and, in token thereof, has lived, for twenty years and upwards, an exemplary life, it would be hard to bring that man to punishment. The private party injured will be presumed, by not complaining, to have forgiven him. The public too is sufficiently secured by his conduct against any further transgression. The law, at first offended, becomes appeased, and all parties are reconciled. No justice requires, that he should thereafter be brought to punishment; and were he to suffer, 'the last footsteps of such a man (says the author above-mentioned) are watered with the tears of his fellow citizens; and we hear from the mouth of every spectator,

Voet.

Penal law, p. 29.

"Yes, I do think, that you might pardon him,

"And neither heaven, nor man, grieve at the mercy."

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Besides, a person in this situation, who has lived twenty years under the load of guilt and dread of public vengeance, has, in reality, suffered the most excruciating punishment; and, as Sir George M'Kenzie says, it would be punishing him twice to bring him to trial after that period. A man may fly from public justice, but he cannot fly from himself. Cain was punished, by putting a mark on him to hinder him from being killed, in order that he might suffer the more.

If, on the other hand, we suppose, that the accused person is not guilty, or that there is a possibility of innocence, the consequences might be dreadful, if prosecution were allowed at any distant period. A man may not know that he is suspected: He may lose the memory of facts essential to his defence: Witnesses may die; may go into distant countries; or may forget circumstances.

To prove *alibi*, at the distance of twenty years, the pannel being innocent, and unsuspicious of any harm, must be totally impracticable, or next to a miracle. What man on earth can say, where he was, and how he was employed, on a particular day or night at the distance of twenty years? A late very remarkable instance happened in England, of a gentleman being wrongously accused of a robbery, and convicted by mistake for another, by the direct testimony of two witnesses, but who luckily was enabled, by unquestionable evidence, to prove himself in a particular company, at the precise time when the robbery happened, and for hours before and after. Had his trial been delayed for twenty years, a proof of *alibi* would have been attempted in vain, and the gentleman would have suffered an ignominious and most unjust death, according to the doctrine which is here maintained.

Neither is it enough to say, that the chance is equal on both sides, for that the prosecutor may also lose his proof. This is no solution of the difficulty. It is only an additional argument in favour of the prescription; because it is pointing out an additional inconvenience, from allowing prosecutions to be brought at so great a distance of time.

Besides, it is a mistake to say, that the chance is equal. A prosecutor may lie by, till it be convenient for him to bring his action, after the exculpatory witnesses are dead, or out of the way. If the right of prosecution is perpetual, he may take his own time; whereas no innocent person, not actually in prison, ever thought of going to a court, and insisting to be prosecuted. In short,
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this perpetual right of criminal prosecution appears to be a most dangerous engine, and the question is of high importance to the lieges of this country. If it is expedient, that they should be quieted as to their properties and civil rights after the enjoyment of them for a certain reasonable time; how much more so is it, that they should have a similar security as to their lives and liberties?

To make this the law of Scotland did not require the aid of statute, being the established law of nations, and a fundamental rule in the Roman juris-prudence, which, especially in criminal matters, is the great foundation and source of ours. The want of the statute would go to this, That no prescription for any length of time could be sustained in any criminal matter. A man at the age of eighty might be tried for an alledged offence committed at fifteen. The age of a patriarch would not exempt him. Nay posterity itself would not be safe. There are instances of crimes triable after the party's death, such as *suicide*. His Majesty's Advocate might bring a trial of this kind for a fact committed some hundred years ago, in order to forfeit the family of the supposed delinquent, of the moveables which belonged to him. If we have not a vicennial prescription, there is no end or limitation whatever to such prosecutions.

Even if the present question were doubtful, it is presumed your Lordships would rather incline *in mitiorem sententiam*; especially when the contrary doctrine would involve us in consequences so highly inexpedient; our lives, liberties, and fame, being exposed to the danger of endless prosecutions.

In respect whereof, &c.

ILAY CAMPBELL.

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